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Supreme Court, U.S.
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No. 03-____

In the Supreme Court of the United States

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, et al.,

Petitioners,

v.

BILLY RAY PHIFFER, an individual,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
JANET A. METCALF
Assistant Attorney General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioners

***Counsel of Record**

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QUESTIONS PRESENTED

1. Was Congress's purported abrogation of the States' Eleventh Amendment immunity from private damages claims for Title II of the Americans with Disabilities Act a valid exercise of its authority under section 5 of the Fourteenth Amendment?

2. Was Congress's purported abrogation of the States' Eleventh Amendment immunity from private damages claims for Section 504 of the Rehabilitation Act a valid exercise of its authority under section 5 of the Fourteenth Amendment?

3. The Court has stated clearly that State Eleventh Amendment immunity is constitutionally protected and that waivers of constitutionally protected rights must be knowing and voluntary. However, the Court also has noted that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, including, perhaps, waiving their Eleventh Amendment immunity. For Section 504 of the Rehabilitation Act, Congress expressly conditioned the States' acceptance of federal funds on the States' waiver of Eleventh Amendment immunity. For the conditioned waiver to be valid, must a State knowingly and voluntarily agree to waive its constitutionally protected sovereign immunity by its acceptance of federal funds or is it sufficient that Congress clearly express its intent to impose the waiver as a condition for receipt of federal funds?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, two Oregon correctional facilities, the Columbia River Correctional Institution and the Santiam Correctional Institution, respectfully pray that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Phiffer v. Columbia River Institute, et al.*, No. 01-35984 (April 21, 2003).[1]

OPINIONS BELOW

The district court's opinion and order was not reported and is attached to this petition. App. 1-13. The opinion of the Ninth Circuit Court of Appeals was not reported and is attached to this petition. App. 14-16.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit Court of Appeals' memorandum decision was dated and filed April 21, 2003. On July 15, 2003, Justice O'Connor granted petitioners an extension of time to file this petition for a writ of certiorari, to and including August 19, 2003. This petition is filed within the extension period granted by the Court.

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[1] Consistent with plaintiff's complaint, the Ninth Circuit Court of Appeals case title identifies the two state correctional facilities as being "institutes." In fact, however, they are "institutions." *See, e.g.*, Or. Admin. R. 291-139-0015(2)(b)(A) (regarding inmate legal assistants in the various correctional institutions, including Columbia River and Santiam); Or. Admin. R. 291-139-0025(2) (regarding law libraries at the Columbia River and Santiam Correctional Institutions).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Spending Clause empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts, and to provide for a common Defense and general welfare of the United States." United States Constitution art. I, § 8, cl. 1.

The Eleventh Amendment to the United States Constitution provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title II of the Americans with Disabilities Act of 1990 provides:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Title II further provides:

- The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 U.S.C. § 12132].

42 U.S.C. § 12133.

Congress purported to abrogate the States' Eleventh Amendment immunity under Title II as follows:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202

The Rehabilitation Act provides in part that:

> (a) No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *
>
> (b) For the purposes of this section, the term "program or activity" means all of the operations of —
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> * * * * *
>
> any part of which is extended Federal financial assistance.

29 U.S.C. § 794. The act further provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 U.S.C. § 794].

29 U.S.C. § 794a(2).

Congress purported to abrogate the States' Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a) as follows:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794] * * *.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a

violation in the suit against any public or private entity other than a State.

STATEMENT OF THE CASE

Plaintiff is a resident of Texas.[2] From July to November 1997 and from April to December 1998, plaintiff was incarcerated in Oregon's Santiam Correctional Institution. From 1997 to April 1998, he was incarcerated in Oregon's Columbia River Correctional Institution. While at Columbia River, plaintiff was enrolled in the Transitional Mental Health Program. In March 1998, he was transferred to the Pathfinders Program. He was required to attend the Pathfinders Program from March through December 1998, during which time he was returned to the Santiam facility. Both the Transitional Mental Health Program and the Pathfinders Program are funded, in whole or in part, by the federal government.

Plaintiff claims that, during his incarceration, he suffered from osteoarthritis and osteoporosis. The Pathfinders Program met for three hours a day, five days per week. As a result of his disability, plaintiff was unable to sit for that period of time. He asked corrections officials at both the Santiam and Columbia River facilities to return him to the Transitional Mental Health Program or, alternatively, for a reasonable accommodation of his disabilities. The corrections officials denied his requests. As a result, he allegedly suffered severe physical pain while enrolled in the Pathfinders Program. Plaintiff contends that the state defendants could have made reasonable modifications to allow him to participate in a program that would have accommodated his disabilities, but that

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[2] This description of the facts is taken from plaintiff's complaint. Because the district court was ruling on the State's Motion for Judgment on the Pleadings, it accepted the plaintiff's allegations as true and drew all inferences in favor of the plaintiff. App. 3.

they failed to do so. He also alleged that the defendants were deliberately indifferent to the strong likelihood that their action or inaction was in violation of his federally protected rights.

In his complaint, plaintiff asserted three claims, one brought under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, one brought under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and one alleging a claim of negligence under the state Tort Claims Act, Or. Rev. Stat. § 30.265. In their amended answer, the state defendants relied, in part, on a claim of Eleventh Amendment immunity to plaintiff's Title II and Section 504 claims. Subsequently, the defendants filed a motion for judgment on the pleadings, relying on the claim of Eleventh Amendment immunity.

The district court denied the state defendants' motion. The district court held that, "as a matter of current law in th[e] circuit, * * * Defendants are not immune from liability under Title II of the ADA pursuant to the Eleventh Amendment." App. 12. The court noted the Ninth Circuit's holding that "Congress acted pursuant to a valid exercise of power when it abrogated state immunity and held the Rehabilitation Act was 'validly enacted under the Fourteenth Amendment.'" App. 12. The court also concluded, based on the Ninth Circuit's case law, that "Defendants waived any immunity available to them under the Eleventh Amendment when they accepted federal funds to operate the[] [pertinent] state programs." App. 13. For that reason, the court denied defendants' motion for judgment on plaintiff's Section 504 claims. App. 13.

The state defendants appealed. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (order denying motion to dismiss that is based on a claim of Eleventh Amendment immunity is subject to interlocutory appeal). On the merits of the state defendants' claim

to immunity from suit brought under Title II of the ADA, the Ninth Circuit Court of Appeals acknowledged the State's "valiant attempt to persuade us that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001), requires us to revisit our precedent[.]" App. 15. But the court noted that it had "already done so and ha[d] already rejected the State's claim." App. 15-16, citing *Hason v. Med. Bd. of Cal.,* 279 F.3d 1167, 1171, *reh'g en banc denied* 294 F.3d 1166 (9th Cir. 2002), and *cert. dismissed* ___ U.S. ___, 2003 WL 1792116 (2003); *Thomas v. Nakatani,* 309 F.3d 1203, 1209 (9th Cir. 2002); and *Lovell v. Chandler,* 303 F.3d 1039, 1050–51 (9th Cir. 2002). The court "decline[d] further review of [its] settled precedent." App. 16.

With regard to the state defendants' claim to immunity from suit based on Section 504 of the Rehabilitation Act, the Ninth Circuit held that its "precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds." App. 16, citing *Douglas v. Cal. Dep't of Youth Auth.,* 271 F.3d 812, 820, *as amended,* 271 F.3d 910 (9th Cir. 2001), *reh'g en banc denied,* 285 F.3d 1226 (9th Cir. 2002). The court rejected the state defendants' argument that intervening precedent from this Court, specifically *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666, 675–76 (1999), had "undermine[d]" the Ninth Circuit's "Eleventh Amendment waiver jurisprudence." App. 16. "Once again," the court noted, it had "already addressed the issue, reaffirming our precedent that a State waives Eleventh Amendment immunity by accepting federal funds." App. 16, citing *Vinson v. Thomas,* 288 F.3d 1145, 1151 (9th Cir. 2002); *Lovell,* 303 F.3d at 1051. The Ninth Circuit thus affirmed the district court's decision and remanded. App. 16.

REASONS FOR GRANTING THE WRIT

Review is warranted in this case because the circuits are split on each of the three questions presented. Moreover, each question raises significant issues concerning the States' sovereign immunity and the ability of Congress to abrogate or force a waiver of that immunity.

I. By granting certiorari in *Tennessee v. Lane* (02-1667), the Court agreed to resolve petitioners' question whether Congress validly abrogated the States' sovereign immunity for Title II of the ADA. This case may provide the Court the opportunity to more completely answer that important question.

As the Court is well aware, the circuits are deeply divided on the question whether Congress's attempt to abrogate the States' sovereign immunity for Title II of the ADA was a valid exercise of its authority under section 5 of the Fourteenth Amendment. In its petition for writ of certiorari in *Tennessee v. Lane* (02-1667), Tennessee thoroughly canvassed the four-way circuit split on this important issue. *Tennessee*, Pet. for Cert. 10-14. However, as Tennessee describes in its petition, despite granting certiorari three times to resolve this question, the opportunity for the Court to address the question has proved illusive. *Tennessee*, Pet. for Cert. 8-9. This case provides the Court with an additional opportunity to resolve the important question of the States' Eleventh Amendment immunity from private damage claims under Title II of the ADA.

In addition, this case may compliment the issue raised in *Tennessee* and give the Court a better opportunity to fully address the Title II immunity question. The claims at issue in *Tennessee* are based on alleged due process violations. The Sixth Circuit held that "the Eleventh Amendment barred claims under Title II of the Americans with Disabilities Act

based on equal protection violations but Congress could abrogate Eleventh Amendment immunity as to due process claims." *Tennessee*, 315 F.3d 682 (citing *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied*, ___ U.S. ___, 123 S.Ct. 72, 154 L.Ed.2d 15 (2002). Thus, the specific ruling at issue in *Tennessee* is whether Congress properly abrogated States' sovereign immunity for due process claims under Title II of the ADA.

The Court granted certiorari to address the broader of the two questions presented in the petition. *Tennessee v. Lane*, 123 S.Ct. 2622 (2003). The Court granted certiorari on the question "Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), exceeds Congress's authority under section 5 of the Fourteenth Amendment, thereby failing to abrogate the states' Eleventh Amendment immunity from private damage claims." The Court did not grant certiorari on the question "Whether the abrogation analysis under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), differs when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns." *Tennessee v. Lane*, 02-1667, Pet. for Cert.

This case compliments the more narrow rulings of the Sixth Circuit in *Tennessee*. Together, the two cases give the Court the opportunity to fully resolve the question whether Congress properly abrogated States' sovereign immunity for all claims under Title II of the ADA.

II. The circuits are divided on the question whether Congress properly abrogated States' sovereign immunity for Section 504 of the Rehabilitation Act under section 5 of the Fourteenth Amendment.

The Court has clarified the limitations on Congress's authority to abrogate States' Eleventh Amendment immunity and established the type of review that courts must undertake when faced with challenges to that Congressional authority. The Court's most detailed statement of what review is required is found in *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). The Court reiterated that "Congress may abrogate the State's Eleventh Amendment immunity [only] when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'" *Id.* at 363, quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). The Court "held that 'the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.'" *Garrett*, 531 U.S. at 364, quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

The Court then proceeded to demonstrate the proper manner of determining whether Congress validly exercised its authority under section 5 of the Fourteenth Amendment. The first step is "to identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. "Once * * * the metes and bounds of the constitutional right in question" have been determined, the next task is to "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled." *Id.* at 368. That examination must focus on alleged discrimination *by the States*. *Id.* And it must be limited to instances of unconstitutional state discrimination. *Id.* Furthermore, "unexamined, anecdotal accounts of 'adverse, disparate

treatment by state officials'" do not suffice to establish the necessary pattern of unconstitutional State discrimination. *Id.* at 370. Even if the legislative history shows "a pattern of discrimination by the States which violates the Fourteenth Amendment," "the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Id.* at 374.

Not all of the circuits have applied the *Garrett* type of analysis to the question of Congress's authority to abrogate the States' sovereign immunity for claims under Section 504 of the Rehabilitation Act and, perhaps as a result, the circuits have reached conflicting conclusions. Most circuits that have addressed the question have found the purported abrogation to exceed Congress's authority under section 5 of the Fourteenth Amendment. In a pre-*Garrett* case, the Ninth Circuit concluded to the contrary and upheld the abrogation as within Congress's authority. Following *Garrett*, the Ninth Circuit has refused to revisit its prior conclusion, creating a conflict between the circuits that have ruled on the issue.[3] Like the question of Congress's authority to abrogate the States' sovereign immunity for Title II of the ADA, the similar question for claims arising under Section 504 of the Rehabilitation Act is important and requires this Court's attention to resolve the conflict between the circuits.

The Second, Fifth, Seventh, Eighth and Tenth Circuits have concluded that Congress lacked the authority to abrogate the States' sovereign immunity for claims under Section 504 of the Rehabilitation Act. The Second Circuit held that Sec-

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[3] Other circuits have found it unnecessary to address this question, because they have concluded that the States waived any immunity they may have had by acceptance of federal funds, as discussed more fully in the next section.

tion 504, like Title II of the ADA, exceeds Congress's authority under section 5 of the Fourteenth Amendment for several reasons. *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2nd Cir. 2001). Both provisions fail the requirement that remedies be congruent and proportional to the constitutional violations Congress sought to remedy or deter; both impermissibly shift the burden of proof onto the state to defend the absence of an accommodation that would be presumptively permissible under the Fourteenth Amendment; both require states to eradicate disparate effects divorced from any inquiry into intent. *Id.* at 109–110, 113. However, the court concluded that Title II could constitutionally apply to claims alleging violations motivated by discriminatory animus or ill will based on the plaintiff's disability, *Id.* at 111, and that Section 504 could constitutionally apply to claims alleging deliberate indifference to the rights secured the disabled by the act, *Id.* at 115.

The Fifth Circuit similarly held that Title II of the ADA exceeded Congress's authority for abrogating States' sovereign immunity and treated Section 504 the same in its analysis. *Reickenbacker v. Foster*, 274 F.3d 974, 977 n 17, 982–83 (5th Cir. 2001). For Section 504, the court concluded that Congress failed to identify a history and pattern of unconstitutional discrimination by the states against the disabled and imposed accommodation obligations on the States that exceed constitutional boundaries. *Id.* The court questioned the Second Circuit's shaping a judicially implied remedy in *Garcia* by permitting plaintiffs to proceed if they could establish violations motivated by discriminatory animus. *Id.* at 983–84 n. 72.

In *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000), the Seventh Circuit concluded with little analysis that Congress lacked the authority to abrogate the States' sovereign immu-

nity because the ADA rests on the Commerce Clause and the ADA and Rehabilitation Act are identical for purposes of § 5.

The Eighth Circuit reviewed the legislative history of Section 504 and found "little indication that Congress properly identified constitutional transgressions it sought to remedy by enacting § 504. In fact, the legislative history is largely silent regarding the reason § 504 was included in the [Rehabilitation Act]." *Bradley v. Arkansas Dept. of Educ.*, 189 F.3d 745, 755 (8th Cir. 1999).[4] "Similarly, the legislative history of the abrogation provision does not identify constitutional transgressions that make such a provision appropriate. The legislative history of § 2000d–7 instead reveals only that Congress sought to override the Supreme Court's decision in *Atascadero* by providing an unequivocal expression of Congress's intent to abrogate the states' immunity." *Id.* at 756.

The Tenth Circuit reviewed the legislative record for both Title II of the ADA and Section 504 and found "some evidence * * * that unconstitutional discrimination against the disabled exists in government 'services, programs, or activities.'" *Thompson v. Colorado*, 278 F.3d 1020, 1033 (10th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1077 (2002). However, the court concluded, "most of those occurrences involve local officials and not the states." *Id.* In addition, many of the examples did not rise to the level of unconstitutional discrimination. *Id.* at 1033–34. As a result of its review, the court concluded that Congress lacked the authority to abrogate the

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[4] The court initially ruled that there was no waiver of immunity because the conditions Congress placed on a State's receipt of federal funds were too broad and therefore coercive. *Bradley*, 189 F.3d at 758. The court reheard that portion of the decision en banc and vacated only that portion of the decision, leaving intact its ruling on the abrogation of sovereign immunity. *Jim C. v. U.S.*, 235 F.3d 1079, 1080 (8th Cir. 2000), *cert. denied sub nom Arkansas Dept. of Education v. Jim C.*, 544 U.S. 949 (2001).

States' sovereign immunity. *See also* Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 89 n. 272 (2001) ("There is no reason to believe that the Rehabilitation Act's legislative history better supports a pattern of state employment discrimination than does that of the ADA Title I.").

The Ninth Circuit stands apart from the other circuits in its refusal to view *Garrett* as setting out the analysis courts must undertake to resolve questions of Congress's authority to abrogate States' sovereign immunity. Prior to *Garrett*, the Ninth Circuit rejected Eleventh Amendment immunity claims in both Title II and Section 504 cases. *Dare v. California*, 191 F.3d 1167, 1173–75 (9th Cir. 1999), *cert. denied* 531 U.S. 1190 (2001) (no Eleventh Amendment immunity as to Title II claim); *Clark v. State of California*, 123 F.3d 1267, 1270 (9th Cir. 1997), *cert. denied sub nom Wilson v. Armstrong*, 524 U.S. 937 (1998) (Eleventh Amendment does not bar Title II or Section 504 claims). In none of those cases did the Ninth Circuit undertake the kind of review this Court set out as a requirement in *Garrett*. Following *Garrett*, the Ninth Circuit simply adhered to its prior decisions and refused the States' argument that a more detailed review of the Eleventh Amendment immunity claims for Title II and Section 504 cases is required. See App 15-16 ("[A]lthough the States makes a valiant attempt to persuade us that * * * *Garrett* * * * requires us to revisit our precedent, we have already done so and have already rejected the State's claims. * * * We decline further review of our settled precedent."); see also, *Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003) (court refused to reexamine its prior holdings regarding the State's sovereign immunity for Title II and Section 504 claims).

It is important for this Court to resolve the split between the circuits on the Section 504 immunity issue for two reasons. First, there is no reason why States in the Ninth Circuit

should have less ability to exercise their sovereign immunity than States in the other circuits. Second, the Court should clarify its expectation that the Ninth Circuit should not disregard the Court's holdings that explain the analysis courts should undertake to resolve a certain type of issue.

III. Review is warranted to resolve the split between the circuits on the effect of Congress's purported waiver of State sovereign immunity for Section 504 claims under the Spending Clause power—a split that appears to be based on a conflict between two competing constitutional provisions.

The question whether a State retains its sovereign immunity for Section 504 claims after accepting federal funds brings two constitutional provisions into play—the Spending Clause and the Eleventh Amendment. The Court's statements about those two provisions appear to have led, at least in part, to the split between the circuits on this question. Those circuits that have treated the Rehabilitation Act as a condition imposed pursuant to Congress's Spending Clause authority have concluded that the waiver of immunity is a valid condition attached to receipt of federal funds. In contrast, those circuits that have viewed the issue under this Court's Eleventh Amendment sovereign immunity jurisprudence have asked whether the States could knowingly and voluntarily waive immunity if they did not have knowledge that they had immunity to waive. The Second and Fifth Circuits have concluded that the waiver could not be valid under that test.

Before describing the split among the circuits, it is important to discuss the Court's statements about Congress's spending power authority and about waiver of Eleventh Amendment immunity. Under the Court's approach to the Spending Clause of Article I, Congress has great leeway to place conditions on the funding it gives to the States. "[O]bjectives not thought to be within Article I's 'enumerated legislative

fields,' * * * may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)).

The Court identified four limitations on the spending power. First, "[t]he exercise of the spending power must be in pursuit of 'the general welfare[,]'" but courts are to "defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207 (quoting *Helvering v. Davis*, 301 U.S. 619, 640–41, 645 (1937). Second, if Congress intends to place a condition on the States' receipt of federal funds, it "must do so unambiguously * * *, enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). Finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds," but "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Dole*, 483 U.S. at 208, 209 (citations omitted).

In addition to these limitations, Congress may not "induce the States to engage in activities that would themselves be unconstitutional" and "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 210, 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

As discussed below, some circuits have viewed the waiver of Eleventh Amendment immunity for Section 504 claims as

a condition Congress placed on the receipt of federal funds under its spending power authority. These circuits have concluded that the condition satisfies the Court's limitations on the spending power. In contrast to these decisions upholding the waiver as simply a condition on the receipt of federal funds, other circuits have focused on the Court's statements regarding Eleventh Amendment immunity in *College Sav. Bank v. Fla. Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666 (1999), leading to a very different analysis of the waiver of immunity for Section 504 claims and a different result.

In *College Savings Bank*, the Court reiterated that, although a State may waive its sovereign immunity, the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" 527 U.S. at 675 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985)). A State's waiver of immunity must be express and unequivocal and the Court rejected the idea of a constructive waiver of immunity.

> The whole point of requiring a "clear declaration" *by the State* of its waiver is to be certain that the State in fact consents to suit. * * * There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an "altogether voluntary" decision to waive its immunity.

College Savings Bank, 527 U.S. at 680–81, quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis in original).

The Court noted that sovereign immunity is constitutionally protected and that waivers of constitutional rights are effective only if the waiver is a knowing and voluntary one.

> The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights. *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937). *See also Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937) (we "do not presume acquiescence in the loss of fundamental rights"). State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected. *Great Northern* [*Life Ins. Co. v. Read*], *supra*, [322 U.S. 47,] at 51 [(1944)]; *Pennhurst* [*State School and Hospital v. Halderman*], 465 U.S. [89], at 98 [(1984)]. And in the context of *federal* sovereign immunity—obviously the closest analogy to the present case—it is well established that waivers are not implied. See, *e.g.*, *United States v. King*, 395 U.S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). We see no reason why the rule should be different with respect to state sovereign immunity.

College Savings Bank, 527 U.S. at 682 (emphasis in original).

The Court recognized that:

> a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe* [*of Fla. v. Florida*, 517 U.S. 44 (1996)]. Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin.

College Savings Bank, 527 U.S. at 683.

Although the Court in *College Savings Bank* appears to have dictated the type of analysis followed by the Second and Fifth Circuits (considering whether States could waive a right to immunity that they did not know existed), it did not resolve the issue presented in this case. The Court left open the door for the analysis followed by the Ninth and other circuits, which have viewed the waiver simply as a condition imposed pursuant to Congress's spending power:

> [W]e have held in such cases as *South Dakota v. Dole*, 483 U.S. 203 (1987) that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions. These cases seem to us fundamentally different from the present one. * * * Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to

> its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity. * * * [W]e think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.

College Savings Bank, 527 U.S. at 686–87.

This case presents the issue that the Court left open in *College Savings Bank* and that appears to have resulted in the split between the circuits: when Congress conditions the acceptance of federal funds on the State's waiver of sovereign immunity, is that action reviewed as a condition under Congress's spending power or as the waiver of a constitutional right which must be knowing, voluntary and unequivocal? The answer to that question appears to have dictated the conclusion reached by the various circuits as they have struggled to resolve the issue.

The Ninth Circuit viewed the waiver in the Rehabilitation Act simply as an exercise of Congress's spending power.

> One way for a state to waive its immunity is to accept federal funds where the funding statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity."

Clark, 123 F.3d at 1271. Because Congress made its intent clear, the Ninth Circuit concluded that the waiver requirement

was valid. *Id.*[5] In a dissent to the court's denial of a suggestion for rehearing en banc on this issue in *Douglas v. California Dept. of Youth Authority*, 285 F.3d 1226 (9th Cir. 2002) (O'Scannlain, J., dissenting), Judge O'Scannlain identified this tension between the Spending Clause analysis and the Eleventh Amendment analysis as a critical issue the Ninth Circuit (and other courts) had failed to address:

> Courts must decide whether a State retains its sovereign immunity after accepting conditioned federal funds are caught between two competing lines of jurisprudence. Under the Supreme Court's approach to the Spending Clause of Article I, Congress has great leeway to place conditions on the funding it gives to the states. * * * Yet, under the Supreme Court's Eleventh Amendment sovereign immunity jurisprudence, Congress's ability to place affirmative obligations on the States using its Fourteenth Amendment enforcement power is rapidly diminishing. * * * Each doctrine pulls us in an opposite direction.

Id. at 1226 (footnote omitted). Judge O'Scannlain identified the two doctrines as, first, the requirement that a State's waiver of its sovereign immunity must be made clearly and voluntarily, with a stringent test for finding a waiver, and second, the countervailing doctrine that Congress may "condition its grant of funds to the States, even by requiring States to take actions that Congress could not directly require them to

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[5] The Ninth Circuit, in this case, simply reiterated its prior holding from *Clark* that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds. App. 16.

take, such as waiving their sovereign immunity." *Id.* at 1228–29, relying on *College Savings Bank* for both propositions.

The Eighth Circuit relied on a similar analysis as the Ninth Circuit majority in upholding the waiver provision for Section 504 claims. *Jim C. v. U.S.*, 235 F.3d 1079 (8th Cir. 2000). Although the court cited *College Savings Bank*, it did so only for the proposition that "Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds, even though Congress could not order the waiver directly." *Id.* at 1081. Instead, it relied on the Court's language in *Dole* that "Congress may attach conditions on the receipt of federal funds." *Jim C.*, 235 F.3d at 1081 (quoting *Dole*, 483 U.S. at 206).

> To avoid the effect of Section 504 on the Arkansas Department of Education, the State would be required to sacrifice federal funds only for that department. This requirement is comparable to the ordinary *quid pro quo* that the Supreme Court has repeatedly approved; the State is offered federal funds for some activities, but, in return, it is required to meet certain federal requirements in carrying out those activities. * * * In these cases, the Court has found no coercive interference with state sovereignty because the State could follow the "'simple expedient' of not yielding." * * * The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice.

Id. at 1081–82. The court considered only whether the waiver provides a clear expression of Congress's intent to condition participation in the program on a State's consent to waive its

constitutional immunity and found that it met that requirement. *Id.* at 1082.

The dissent in *Jim C.* found the financial inducement offered by Congress for the State's waiver of its sovereign immunity coercive and challenged the majority's decision as permitting Congress to "achieve indirectly what it cannot constitutionally achieve directly" by an abrogation of the State's immunity. *Id.* at 1082–83 (Bowman, J., dissenting). The dissent concluded that the condition imposed with respect to Rehabilitation Act claims "bears no direct relationship (indeed, not even a discernible relationship) to the purpose of most federal grants to the states for education," *Id.* at 1084, and therefore exceeds what Congress may permissibly exact in exchange for federal funds.

The Third Circuit upheld the waiver, looking only at whether Congress, in amending the Rehabilitation Act, made it clear that accepting federal funds results in a waiver of Eleventh Amendment immunity. *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 170 (3rd Cir. 2002) *cert. denied sub nom Pennsylvania Dept. of Corrections v. Koslow*, ___ U.S. ___, 123 S.Ct. 1353, 155 L. Ed. 2d 196 (2003). While noting that "[a] state's waiver of sovereign immunity is not lightly granted" and "[m]ere participation in a federal program is not sufficient to waive immunity," the court nevertheless concluded that "where a state participates in a federal financial assistance program 'in light of the existing state of the law,' the state is charged with awareness that accepting federal funds can result in the waiver of Eleventh Amendment immunity." *Id.* at 172 (quoting *Edelman v. Jordan*, 415 U.S. 651, 687 (1974)). The court also rejected the State's argument that the waiver provision constituted an unconstitutional condition, requiring a surrender of constitutionally protected rights, relying in part on *College Savings Bank* for the proposition that this Court allowed "Congress to condition the exer-

cise of an Article I power on a state's agreement to relinquish Eleventh Amendment immunity." *Id.* at 173.

The Tenth Circuit similarly concluded that because Congress clearly stated its intent that States would waive their immunity by receipt of federal funds, the waiver satisfied the requirement of "an unequivocal indication that the State intends to consent to federal jurisdiction that would otherwise be barred by the Eleventh Amendment." *Robinson v. Kansas*, 295 F.3d 1183, 1189–90 (10th Cir. 2002), *cert. denied sub nom Kansas v. Robinson*, ___ U.S. ___, 123 S.Ct. 2574 (2003) (quoting *Atascadero*, 473 U.S. at 238 n. 1).

The Eleventh Circuit reached the same conclusion in a case dealing with claims under Title VI of the Civil Rights Act of 1964, which are based on a parallel statement of waiver in 42 U.S.C. § 2000d-7 as the waiver for the Section 504 claims. *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *reversed on other grounds Alexander v. Sandoval*, 532 U.S. 275 (2001). The court focused only on the language used by Congress and found that the "provision's plain language manifests an unmistakable intent to condition federal funds on a state's waiver of sovereign immunity." *Id.* at 493. The court relied on this Court's statements in *College Savings Bank* "reaffirm[ing] the constitutionality of conditioning federal funds upon the waiver of state sovereign immunity." *Id.* at 494.[6]

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[6] The Seventh Circuit, relying in part on *Sandoval* stated that "the Rehabilitation Act also is a condition on the receipt of federal funds, and legislation under the spending power is not affected by *Kimel*." *Stanley*, 213 F.3d at 344. The court provided little analysis in support of its conclusion that "the Rehabilitation Act is enforceable in federal court against recipients of federal largess." *Id.* Similarly, the Sixth Circuit, relying in part on *Stanley*, concluded that Congress's validly conditioned the States' acceptance of federal funds on a waiver of sovereign immunity because the language in

In contrast to the circuits upholding the waiver provision as a valid exercise of Congress's spending power, other circuits have focused on this Court's strong language in *College Savings Bank* that State sovereign immunity is a constitutional right that, like other constitutional rights, can only be waived if the waiver is knowing and voluntary. The Second Circuit relied on *College Savings Bank* in reaching its conclusion that the waiver imposed on the receipt of federal funds under Section 504 of the Rehabilitation Act can be valid only if the state "has made a knowing and intentional waiver[.]" *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 114 (2nd Cir. 2001).

> [W]e are unable to conclude that New York in fact waived its sovereign immunity against suit under § 504 when it accepted federal funds for SUNY. At the time that New York accepted the conditioned funds, Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress's Commerce Clause authority. Indeed, the ADA expressly provided that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation...." 42 U.S.C. § 12202. Since, as we have noted, the proscriptions of Title II and § 504 are virtually identical, *a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, College Sav-*

Section 2000d-7 so clearly expressed Congress's intent to impose the condition. *Nihiser v. Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001), *cert. denied sub nom Ohio E.P.A. v. Nihiser*, 536 U.S. 922 (2002).

> *ings Bank*, 527 U.S. at 682, *since by all reasonable appearances state sovereign immunity had already been lost*[.]

Garcia, 280 F.3d at 114 (emphasis added, citation and footnote omitted).

The Second Circuit criticized the decisions of its sister circuits as:

> unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds. None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required in *College Savings Bank*, 527 U.S. at 682.

Garcia, 280 F.3d at 115 n. 5.

The Fifth Circuit took a similar approach to its analysis of the question. Although it recognized that Congress enacted the conditional waiver provision pursuant to its spending power, it, too, required that the State's waiver be knowing and voluntary. *Pace v. Bogalusa City School Board*, 325 F.3d 609, 615-16, rehearing en banc allowed, ___ F.3d ___, 2003 WL 21692677 (5th Cir. 2003).

> Prior to *Reickenbacker* [*v. Foster*, 274 F.3d 974 (5th Cir. 2001)], the State defendants had little reason to doubt the validity of Congress's asserted abrogation of state sovereign immunity under § 504 of the Rehabilitation Act or Title II of the ADA. Believing that the acts validly abrogated their sovereign immunity, the

> State defendants did not and could not know that they retained any sovereign immunity to waive by accepting conditioned federal funds. * * * The Louisiana defendants' actions were voluntary, but they did not manifest a *knowing* waiver of that which they could not know they had the power to waive.

Pace, 325 F.3d at 616 (emphasis in original, footnotes omitted).

In *Miller v. Texas Tech University Health Sciences Center*, 330 F.3d 691 (5th Cir. 2003), the court clarified its view of the relationship between the analysis of conditions imposed under Congress's spending power and waivers of sovereign immunity. It identified "two inquiries" it must make "in determining whether a state has waived its sovereign immunity by accepting federal funds." *Id.* at 694. The first is whether Congress manifested a clear intent to condition participation in the programs funded under the Act on a State's waiver of its constitutional immunity. *Id.* The second is whether the state knowingly and voluntarily intended to waive its immunity by accepting the funds. *Id.* Although the court acknowledged that "the two inquiries overlap in most cases," it treats a condition requiring waiver of a state's sovereign immunity differently than other conditions by requiring the waiver to be of a known right and indulging every reasonable presumption against a finding of a waiver. *Id.*

> What looks like a hard but plain choice in retrospect—accept funds and thereby waive sovereign immunity—at the time was in fact an easy and carefree choice for Tech—accept funds without consequence, because § 2000d-7 appeared already to have abrogated Tech's immunity. Tech's "actions were voluntary, but [it] did not manifest a knowing waiver of that

> which [it] could not know [it] had the power to waive." [*Pace*,] at 616–17. To hold otherwise and impute to Tech a degree of omniscience would undermine the "central purpose" of the doctrine of state sovereign immunity: "to 'accord the States the respect owed them as' joint sovereigns." [*Fed. Maritime Comm'n v.*]*S.C. State Ports Auth.*, 535 U.S. [743,] 765 [(2002)] (quoting *Puerto Rico Aqueduct & Sewer Auth.* [*v. Metcalf & Eddy, Inc.*], 506 U.S. [139,] 146 [(1993)]).

Miller, 330 F.3d at 695 (footnote omitted).

Thus, the majority of circuits have focused solely on this Court's statements regarding the authority of Congress to place conditions on the receipt of federal funds under its spending power. That approach gives too little regard for the constitutional basis of State sovereign immunity and this Court's equally clear statement that the unequivocal expression of Congress's intent cannot serve as the State's unequivocal expression that it is waiving its sovereign immunity. States may have been put on notice by the language in section 2000d-7 of the Rehabilitation Act, but they cannot be said to have knowingly and voluntarily waived their constitutional right to sovereign immunity. This case presents the Court with the opportunity to clarify an important question that divides the federal circuits.

CONCLUSION

For the reasons discussed above, petitioners respectfully request that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
JANET A. METCALF
Assistant Attorney General
Counsel for Petitioner

August 19, 2003

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BILLY RAY PHIFFER,

Plaintiff,

v.

DEPARTMENT OF CORRECTIONS COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon public entity, and DEPARTMENT OF CORRECTIONS SANTIAM CORRECTIONAL INSTITUTION, a State of Oregon public entity,

Defendants.

CV 00-1652-BR

OPINION AND ORDER

DAWNA F. SCOTT
Law Office of Dawna F. Scott
Lakeside Plaza, Suite 300
8 North State Street
Lake Oswego, OR 97034
(503) 636-0400

Attorney for Plaintiff

HARDY MYERS
Attorney General
JOHN CLINTON GEIL
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97310
(503) 378-6313

Attorneys for Defendant

BROWN, Judge.

This matter comes before the Court on Defendants' Motion for Judgment on the Pleadings (#14) as to Plaintiff's First and Second Claims. Plaintiff brought this action alleging Defendants failed to reasonably accommodate his disabilities while he was incarcerated. Plaintiff asserts three claims in his Complaint:

First – Unlawful Discrimination on the Basis of Disability in Violation of Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12132;

Second – Unlawful Discrimination on the Basis of Disability in Violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and

Third – Negligence under the Oregon Tort Claims Act (OTCA), Or. Rev. Stat. § 30.265.

Plaintiff seeks injunctive relief, damages, attorneys' fees, and costs. For the purpose of deciding Defendants' Motion, the Court will assume it has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(4), and 1367(a).

For the reasons that follow, Defendants' Motion for Judgment on the Pleadings is **DENIED**.

RELEVANT FACTUAL BACKGROUND[1]

Plaintiff is a resident of Texas who formerly was incarcerated in Oregon. From July 1997 to November 1997 and from April 1998 to December 1998, Plaintiff was incarcerated at the Santiam Correctional Institution (SCI). From November 1997 to April 1998, Plaintiff was incarcerated at the Columbia River Correctional Institution (CRCI).

While at CRCI, Plaintiff was enrolled in the Transitional Mental Health Program. In March 1998, he was transferred to the Pathfinders Program. He was required to attend the Pathfinders Program from March 1998 through December 1998, during which time he was returned to SCI. Both the Transitional Mental Health Program and the Pathfinders Program are funded by the federal government.

During his incarceration, Plaintiff suffered from osteoarthritis and osteoporosis. He was unable to sit for the three-hour period, five times a week, required to participate in the Pathfinders Program. Plaintiff requested Defendants to return him to the Transitional Mental Health Program or, alternatively, to reasonably accommodate him for his disabilities. Defendants denied his requests. As a result, Plaintiff suffered severe physical pain while he was enrolled in the Pathfinders Program. Plaintiff contends Defendants were deliberately indifferent to the strong likelihood that their action and/or inaction violated Plaintiff's federally-protected rights.

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[1] This factual summary is taken from Plaintiff's Complaint. For the purpose of Defendants' Motion, the Court has accepted Plaintiff's allegations as true and has drawn all inferences in favor of Plaintiff, the nonmoving party.

STANDARDS

Pursuant to Fed. R. Civ. P. 12(c), any party may move for judgment on the pleadings after the pleadings are closed. For purposes of such a motion, the court accepts the nonmoving party's allegations as true and views all inferences in a light most favorable to the nonmoving party. *Doyle v. Raley's Inc.*, 158 F.3d 1012, 1014 (9th Cir. 1998) (citations omitted). A judgment on the pleadings is properly granted when, taking all allegations in the nonmoving party's pleadings as true, the moving party is entitled to judgment as a matter of law. *See McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997) (citation omitted). *See also Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999).

DISCUSSION

Defendants seek dismissal of Plaintiff's First and Second Claims. In support of their Motion, Defendants contend they are immune from private actions brought under Title II of the ADA and Section 504 of the Rehabilitation Act pursuant to the Eleventh Amendment because they are state government entities. Defendants acknowledge the United States Congress intended to abolish state immunity when Congress enacted the ADA and Section 504; nevertheless, Defendants argue the states are immune under the Eleventh Amendment because Congress exceeded its constitutional authority when it enacted those portions of the Acts.

A. Plaintiff's First Claim under Title II of the ADA

Plaintiff asserts in his First Claim that Defendants violated Title II of the ADA when they failed to reasonably accommodate him for his disabilities and compelled him to participate in the Pathfinders Program. Title II of the ADA provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The ADA defines "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B).

Defendants base their arguments on a recent decision by the United States Supreme Court in which the Court ruled Congress did not validly abrogate the states' sovereign immunity from actions brought in federal court by private claimants for money damages under Title I of the ADA.[2] *See Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356, 121 S. Ct. 955, 967-68 (2001). The Court held, therefore, actions brought in federal court by state employees to recover money damages for a state's failure to comply with Title I of the ADA are barred by the Eleventh Amendment. *Id.* Defendants maintain their Motion should be granted because the

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[2] Title I of the ADA addresses discrimination in employment and provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

Court's rationale in *Garrett* applies equally to both of Plaintiff's claims.

Plaintiff counters Defendants' Motion should be denied. Plaintiff relies on *Pennsylvania Dept. of Corrections v. Yeskey* in which the Supreme Court held Title II of the ADA applies to state prisons. 524 U.S. 206, 209-10 (1998). Plaintiff argues the *Garrett* decision did not change the relevant, analytical framework for determining whether Congress validly nullified the states' Eleventh Amendment immunity from actions brought in federal court. Plaintiff also points out before and after *Garrett*, the Ninth Circuit held Congress validly abrogated state prisons' sovereign immunity from claims brought in federal court under Title II of the ADA and Section 504 of the Rehabilitation Act.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment also precludes citizens from bringing actions in federal court against their own states. *Garrett*, 121 S. Ct. at 962 ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.") (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)). Nevertheless, pursuant to its enforcement powers in § 5 of the Fourteenth Amendment, Congress is authorized to abrogate the states' Eleventh Amendment immunity when Congress (1) unequivocally expresses an intent to do so, and (2) acts pursuant

to a valid grant of constitutional authority. *Id. See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996).

There is no dispute Congress unequivocally expressed its intent to abrogate the states' immunity from liability for statutory violations when Title II of the ADA was enacted. 42 U.S.C. § 12202 provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State Court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Relying on *Garrett*, however, Defendants maintain Congress acted outside the permissible scope of its constitutional power when it abrogated the states' sovereign immunity for violations of Title II of the ADA. In § 5, the Fourteenth Amendment grants Congress the power to enforce "by appropriate legislation" the substantive guarantees set forth in § 1.[3] *See*

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[3] Section One of the Fourteenth Amendment provides:

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Garrett, 121 S. Ct. at 963 (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

In *Garrett*, the Court concluded Title I of the ADA, which pertains to public employment, was not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment. *Id.* at 968. The Court noted a state is not required to make special accommodations for the disabled if the state's conduct satisfies the minimum "rational-basis" review that courts apply to general social and economic legislation. *Id.* at 963-64. After an examination of the relevant legislative history, the Court determined Congress did not make a finding of "a pattern of irrational state discrimination in employment against the disabled." *Id.* at 965. Moreover, the Court found the rights and remedies created by Title I of the ADA were not congruent and proportional to any relevant constitutional violations identified by Congress. *Id.* at 966-68.

Defendants argue the Supreme Court's analysis applied to Title I in *Garrett* also applies to Title II. Defendants further assert this Court is bound to follow the Supreme Court's reasoning in *Garrett* and, therefore, must find Defendants immune from liability under Title II. Plaintiff argues the Court did not address Title II in *Garrett*; and, therefore, this Court must follow Ninth Circuit precedent set out in the cases discussed below in which the appellate court established Title II of the ADA is a valid exercise of Congress's constitutional power. The Court agrees with Plaintiff and rejects Defendants' arguments.

Before *Garrett*, the Supreme Court held Title II of the ADA "plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt." *Pennsylvania v. Yeskey,* 524 U.S. at 209 (emphasis in original). Without addressing the constitutional issues raised by Defendants in the case before this Court, the Supreme Court reasoned, "The text of [Title II of] the ADA provides no basis for dis-

tinguishing [state prison] programs, services, and activities from those provided by public entities that are not prisons." *Id.* at 210.

In *Garrett*, however, the Court expressly declined to "decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment." 121 S. Ct. at 960 n.1, 966 n.7. The Supreme Court has not determined after *Garrett* whether Title II of the ADA is constitutional; therefore, only Ninth Circuit decisions on that issue bind this Court. The Ninth Circuit has consistently ruled Title II of the ADA is a valid exercise of Congress's power under § 5.

For instance, in *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), the plaintiffs were state inmates who sought injunctive relief under Title II of the ADA on the grounds they were discriminated against due to their developmental disabilities. The Ninth Circuit applied the two-part test set forth in *Seminole Tribe*, found Title II of the ADA to be a valid exercise of Congress's power under § 5 of the Fourteenth Amendment, and affirmed the district court's decision that the State of California was not immune from liability pursuant to the Eleventh Amendment. *Id.* at 1269-70.

In *Dare v. California*, the Ninth Circuit also held Title II of the ADA is "a congruent and proportional exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment that abrogated [the State of California's] Eleventh Amendment immunity." 191 F.3d 1167, 1175 (9th Cir 1999), *cert. denied*, 121 S. Ct. 1187 (2001). The court noted Congress "made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face." *Id.* (citing 42 U.S.C. § 12101(a)). The court reasoned, therefore, "[W]e will not second-guess Con-

gress's judgment that the ADA was targeted to remedy and prevent irrational discrimination against people with disabilities." *Id.* (internal quotations and citation omitted). After *Garrett*, without addressing constitutional issues, the court ruled Title II of the ADA "applies to state prisons." *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (citing *Yeskey*, 524 U.S. at 209).

Plaintiff also cites and relies on *Wroncy v. Oregon Department of Transportation,* No. 00-35356, 2001 WL 474550, at *1-2 (9th Cir. Apr. 9, 2001), a Ninth Circuit unpublished, post-*Garrett* decision. Plaintiff contends the Ninth Circuit affirmed *Clark* and *Dare* in *Wroncy*. Plaintiff further contends the Ninth Circuit did not reconsider its pre-*Garrett* decision because the Supreme Court expressly declined to reach the constitutionality of Title II in *Garrett*. Defendants point out *Wroncy* might have supported Plaintiff's position if it were a published opinion, but unpublished decisions of the Ninth Circuit are neither persuasive nor controlling authority. *See* 9th Cir. Rule 36-3. *See also Sorchini v. City of Covina*, 250 F.3d 706, 709 (9th Cir. 2001). Accordingly, this Court will not consider *Wroncy* or any other unpublished decision cited by Plaintiff.

In a post-*Garrett* decision, the Ninth Circuit held a claim against a California Senate Committee under Title V of the ADA was barred by the Eleventh Amendment. *See Demshki v. Monteith,* 255 F.3d 986, 988-89 (9th cir. 2001). Title V prohibits discrimination against any individual who opposes an "act or practice made unlawful" by the substantive provisions of the ADA. 42 U.S.C. § 12203(a). In *Demshki*, a former employee alleged he was unlawfully discharged for expressing concern over the Senate Committee's possible violation of relevant law pertaining to disabled job applicants. *Id.* at 987. The Ninth Circuit reasoned:

> We recognize that *Garrett* arose in the context of Title I, but we nevertheless conclude that the Court's holding necessarily applies to claims brought under Title V of the ADA, at least where, as here, the claims are predicated on alleged violations of Title I.

Id. at 988. The Ninth Circuit did not discuss or criticize its prior holdings in *Clark* or *Dare* nor did it address the constitutionality of Title II of the ADA. The *Demshki* decision, therefore, does not alter existing precedent in which the Ninth Circuit has held Title II of the ADA to be a valid exercise of Congress's power. *See Dare*, 191 F.3d at 1174-75. *See also Clark*, 123 F.3d at 1270.

District courts cannot ignore controlling case authority even if it "appears to rest on reasons rejected in some other line of cases." *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir. 2000) (circuit courts of appeal must follow precedential decisions by the United States Supreme Court), *petition for cert. filed*, 69 U.S.L.W. 3763, 70 U.S.L.W. 3035-36 (U.S. May 21, 200) (Nos. 00-1772, 00-1741, and 00-1754) (internal quotations and citations omitted). *See also Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1192 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998) (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). This Court must follow Ninth Circuit precedent. *See Yong v. Immigration and Naturalization Service (INS)*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) ("[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it . . . ."). *See also United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir.) (directly binding decisions must be followed, leaving to the higher court "the prerogative of overruling its own case decisions."), *cert. denied*, 121 S. Ct. 1503 (2001) (internal quotations and citation omitted). Accordingly, this Court finds Plaintiff's First Claim is not defi-

cient as a matter of current law in this circuit, and Defendants are not immune from liability under Title II of the ADA pursuant to the Eleventh Amendment.

B. Plaintiff's Second Claim Under Section 504 of the Rehabilitation Act.

The parties agree the Court must evaluate a claim brought under Section 504 of the Rehabilitation Act by applying the same two-part test used to determine whether Congress properly abrogated state sovereign immunity when it enacted Title II of the ADA. Defendants concede Section 504 satisfies the first element because Congress clearly and unequivocally expressed its intention to abolish state immunity under the Eleventh Amendment. The Rehabilitation Act provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1). *See also Clark*, 123 F.3d at 1269 ("Congress has unequivocally expressed its intent to abrogate the State's immunity under . . . the Rehabilitation Act.").

The Ninth Circuit evaluated whether Congress acted pursuant to a valid exercise of power when it abrogated state immunity and held the Rehabilitation Act was "validly enacted under the Fourteenth Amendment." *Id.* at 1270. The Ninth Circuit reasoned, "Congress explicitly found that persons with disabilities have suffered discrimination", and "section 504 of the Rehabilitation Act is to prohibit discrimination against the disabled." *Id.*

In *Clark*, the Ninth Circuit also held a state's acceptance of Rehabilitation Act funds creates an express waiver of the state's immunity under the Eleventh Amendment in a discrimination action under Section 504 of the Rehabilitation Act. *Id.* at 1271.

Plaintiff alleges in his Complaint the Transitional Mental Health Program and the Pathfinders Program were wholly or partially funded through federal financial assistance. Viewing Plaintiff's allegations as true at this stage of the proceedings, the Court concludes Defendants waived any immunity available to them under the Eleventh Amendment when they accepted federal funds to operate these state programs. Accordingly, Defendants' Motion to Dismiss Plaintiff's Second Claim Under Section 504 of the Rehabilitation Act is denied.

CONCLUSION

Based on the foregoing, Defendants' Motion for Judgment on

the Pleadings (#14) is **DENIED**.

IT IS SO ORDERED.

Dated this 17th day of September, 2001.

/s/ Anna J. Brown
ANNA J. BROWN
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY RAY PHIFFER, an individual,

Plaintiff-Appellee,

v.

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, et al.,

Defendants-Appellants.

No. 01-35984

D.C. No. CV-01-01652-AJB

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Submitted March 6, 2003**
Portland, Oregon

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: O'SCANNLAIN, FERNANDEZ, and FISHER, Circuit Judges

The State appeals the district court's denial of its motion for judgment on the pleadings based on Eleventh Amendment sovereign immunity. The facts and prior proceedings are known to the parties, and are restated herein only as necessary.

The denial of a state's motion for judgment on the pleadings on the grounds of Eleventh Amendment immunity is an interlocutory appeal and need not await final judgment. *See Clark v. California,* 123 F.3d 1267, 1269 (9th Cir. 1997) ("This court has jurisdiction to hear an interlocutory appeal from an order denying a state's motion to dismiss on the ground of immunity under the Eleventh Amendment." (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993))). The Respondent contends, however, that we must look at each case to determine whether the appeal involves a "serious and unsettled question of law." We disagree. We have never required such a showing for an interlocutory appeal of Eleventh Amendment immunity, *see, e.g., Thomas v. Nakatani*, 309 F.3d 1203, 1206-07 (9th Cir. 2002), nor has the Supreme Court, *see, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993), and we decline to require such a showing at this time. Accordingly, we have jurisdiction over the State's appeal.

Our precedent clearly commands the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA. *See, e.g., Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999); *Clark*, 123 F.3d at 1270. And, although the State makes a valiant attempt to persuade us that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), requires us to revisit our precedent, we have already done so and have already rejected the State's claims. *See Hason v. Med. Bd. of*

Cal., 279 F.3d 1167, 1171, *reh'g en banc denied* 294 F.3d 1166 (9th Cir. 2002), *and cert. dismissed* 2003 WL 1792116 (U.S. April 7, 2003) (No. 02-479); *Thomas v. Nakatani*, 309 F.3d 1203, 1209 (9th Cir. 2002) (stating that *Hason* reaffirmed *Clark*'s and *Dare*'s holding that Congress abrogated sovereign immunity under Title II); *Lovell v. Chandler*, 303 F.3d 1039, 1050-51 (9th Cir. 2002) (same). We decline further review of our settled precedent.

Likewise, our precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds. *See, e.g., Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 820, *as amended*, 271 F.3d 910 (9th Cir. 2001), *and reh'g en banc denied*, 285 F.3d 1226 (9th Cir. 2002). Again, the State points to "intervening Supreme Court precedent," this time *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675-76 (1999), which it contends undermines our Eleventh Amendment waiver jurisprudence. Once again, we have already addressed the issue, reaffirming our precedent that a State waives Eleventh Amendment immunity by accepting federal funds. *Vinson v. Thomas*, 288 F.3d 1145, 1151 (9th Cir. 2002) (reaffirming *Douglas*'s holding that by accepting federal funds, a state waives its sovereign immunity); *Lovell*, 303 F.3d at 1051 (same). We find the State's claims without merit.

AFFIRMED and REMANDED.

(2)

Supreme Court, U.S.
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No. 03-279

In The

Supreme Court of the United States

COLUMBIA RIVER CORRECTIONAL INSTITUTE,
a State of Oregon Public Entity, et al.,

Petitioners,

v.

BILLY RAY PHIFFER, an individual,

Respondent.

On Petition Fo A Writ Of Certiorari
To The United S ates Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

DAWNA F. SCOTT
LAW OFFICE OF DAWNA F. SCOTT, P.C.
Lakeside Plaza, Suite 300
8 North State Street
Lake Oswego, Oregon 97034
(503) 636-0400

Counsel for Respondent,
Billy Ray Phiffer

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether Congress acted pursuant to its legislative authority granted under § 5 of the Fourteenth Amendment to the United States Constitution when enacting Title II of the American with Disabilities Act, thereby abrogating States' Eleventh Amendment immunity from individual claims for damages.

2. Whether Congress acted pursuant to its legislative authority granted under § 5 of the Fourteenth Amendment to the United States Constitution when enacting § 504 of the Rehabilitation Act of 1973, thereby abrogating States' Eleventh Amendment immunity from individual claims for damages.

3. Whether the acceptance of federal funds explicitly conditioned upon the waiver of a States' Eleventh Amendment immunity constitutes a knowing and voluntary waiver of sovereign immunity to individual claims for damages.

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STATEMENT OF THE CASE

Respondent accepts Petitioners' statement of the case, as set forth in its Petition at 5 to 7.

SUMMARY OF ARGUMENTS

The thrust of Petitioners' Petition for Writ of Certiorari is that review of the Ninth Circuit's decision below is warranted because post-*Garrett*,[1] the circuits are split on whether Congress exceeded its authority for abrogating States' sovereign immunity under Title II of the Americans with Disabilities Act (hereinafter, the "ADA") and § 504 of the Rehabilitation Act. Petitioners' Brief at 10 to 15. Petitioners also argue that the narrower issue of whether an individual claim brought under Title II of the ADA[2] "is purportedly tied to due process concerns rather than equal protection process concerns" (Petitioners' Brief at 9) was not addressed in *Tennessee v. Lane* (02-1667), giving this Court the opportunity "to fully resolve the question whether Congress properly abrogated States' sovereign immunity for all claims under Title II of the ADA." *Id.*

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[1] *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001).

[2] *See, e.g., Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003) (Congress validly abrogated State immunity under Title II); *Lane v. Tennessee*, 315 F.3d 682 (6th Cir. 2003), *cert. granted*, 123 S.Ct. 2622 (2003) (Congress could abrogate Eleventh Amendment immunity under Title II of the Americans with Disabilities Act for due process claims); *Wessell v. Glendening*, 306 F.3d 203 (4th Cir. 2002) (States may not be sued for violating Title II); *Kiman v. New Hampshire Dep't of Corrections*, 301 F.3d 13 (1st Cir. 2002) (States may be sued for violations of Title II).

Most importantly to this case, Petitioners argue that review is necessary because the Ninth Circuit "refuses to view *Garrett* as setting out the analysis courts must undertake to resolve questions of Congress's [sic] authority to abrogate States' sovereign immunity." Petitioners' Brief at 14.

Respondent submits that review by this Court is not necessary. This Court has already accepted for review in *Tennessee v. Lane* the broader issue of whether Title II of the ADA exceeds Congress' authority under § 5 of the Fourteenth Amendment, which mirrors the Petitioners' first question presented for review to this Court. Therefore, it is unnecessary for the Court to review the same issue herein.

In addition, review is not necessary in this case, because the Petitioners' justification for review of the narrower issue the Court declined to review in *Tennessee* is based on an issue that was never raised below. That is, the Petitioners argue that the issue of "[w]hether the abrogation analysis under Title II of the [ADA], differs when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns," which was not addressed in *Tennessee v. Lane*, should be resolved in the case herein. Petitioners' Brief at 9. Petitioners have never addressed the abrogation issue solely in terms of due process or equal protection concerns in the courts below, and this Court's "traditional rule" precludes a grant of certiorari when the question presented was not pressed or passed on below. *United States v. Williams*, 504 U.S. 36, 42 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 255 (1990).

Finally, Respondent submits that review is not necessary, because the Ninth Circuit has consistently adhered – both pre- and post-*Garrett* – to this Court's test first outlined in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), for determining the constitutionality of federal legislation in relation to States' Eleventh Amendment immunity to suits for damages by private individuals. In this case, the Ninth Circuit correctly applied this Court's precedents in holding that the Petitioners herein could be sued for violating Title II of the ADA and for violating § 504 of the Rehabilitation Act. App-15.

REASONS FOR DENYING REVIEW

I. This Court has already granted certiorari in *Tennessee v. Lane* on one of the three questions presented for review by the Petitioners in this case; therefore, review of Petitioners' first question is unnecessary.

As Petitioners have pointed out, this Court has recently granted certiorari in *Tennessee v. Lane* (02-1667) on one of the two questions presented to the Court by the petitioner in that case. Petitioners' Brief at 8-9. In *Tennessee*, this Court accepted for review the broader question of "Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131-12165 (2002), exceeds Congress's [sic] authority under § 5 of the Fourteenth Amendment, thereby failing to abrogate the States' Eleventh Amendment immunity from private damage claims." Petitioners' Brief at 9.

Since this case presents the same issue for review, further review is not warranted.

II. The issue of whether the abrogation analysis under Title II is tied to due process concerns rather than equal protection concerns was neither pressed nor passed below; therefore, review is not warranted.

Petitioners argue that since this Court did not grant certiorari on the second, more narrower question presented in *Tennessee v. Lane* – "Whether the abrogation analysis under Title II of the [ADA] differs when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns" (Petitioners' Brief at 9) – review is warranted in this case to "fully resolve the question of whether Congress properly abrogated States' sovereign immunity for all claims under Title II of the ADA." *Id.*

However, that issue has never been raised by the Petitioners herein, nor has it ever been litigated in this case. It is well established that "[i]t is this Court's practice to decline to review those issues neither pressed nor passed upon below" (*FW/PBS, Inc.*, *supra*, 493 U.S. 215 at 255). This Court should also pass on reviewing Petitioners' Petition for Writ of Certiorari for that reason, as well.

III. Review of the lower court's decision is not necessary because the Ninth Circuit applied this Court's clearly established principles in holding that the two state correctional institutes could be sued for violations of the Americans with Disabilities Act.

The Ninth Circuit Court of Appeals followed the line of cases decided by this Court in interpreting whether the Eleventh Amendment was a bar to the Respondent's claim

under Title II of the ADA, the application of which is uniform, general and clearly established.

In *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), *cert. den. sub nom Wilson v. Armstrong*, 524 U.S. 937 (1998), the Ninth Circuit was asked to decide whether the Eleventh Amendment was a bar to plaintiffs' suit for damages against the State of California. The court asked, "first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power" in abrogating the States' immunity under Title II of the ADA. *Clark*, 123 F.3d at 1269, *citing Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1123 (1996). In *Garrett*, when faced with the question of "whether employees of the State of Alabama may recover money damages by reason of the State's failure to comply with the provisions of Title I of the Americans with Disabilities Act of 1990," this Court utilized the same two-part inquiry from its decisions in *Seminole Tribe* and *Kimel v. Florida Bd. of Regents*, 528 U.S. 62; 120 S.Ct. 631 (2000) that the Ninth Circuit had used previously in *Clark*.

The first part of the test – whether Congress unequivocally expressed its intent to abrogate immunity under Title I – was not in dispute in *Garrett*. 531 U.S. at 356.[3] *Garrett*'s holding that the Eleventh Amendment bars suits in federal court by State employees to recover money damages for violations of Title I of the ADA, therefore, was

[3] *Citing* 42 U.S.C. § 12202 which States that "A State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."

based on this Court's analysis of whether Congress acted within its constitutional authority in subjecting the States to suits in federal court for money damages under the ADA.

This Court began its analysis in *Garrett* by reiterating that "Congress may subject nonconsenting States to federal-court suit when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Id.*; *see also Kimel*, 528 U.S. at 80; *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1997).

The *Garrett* opinion necessarily focused on the second part of the inquiry of the *Seminole Tribe* test, which requires a court to first identify with some precision the scope of the constitutional right at issue. *Garrett*, *supra*, 531 U.S. at 356, 365.

Once the parameters of the constitutional right in question have been determined by the court, the court must then examine whether Congress identified a history and pattern of such unconstitutional behavior by the States that Congress sought to redress. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 627, 670 (1999).

While this Court, in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), reaffirmed Congress' ability to enact federal legislation to carry out the Fourteenth Amendment's objective, and stated that Congress may enact legislation that prohibits more conduct than that which is prohibited by the Fourteenth Amendment itself, the Court has since cautioned that congressional authority has limits. Federal legislation can remedy or deter Fourteenth Amendment violations, but there must be a congruence between the means used and the ends to be achieved.

Garrett, 531 U.S. at 374, citing *City of Boerne*, 521 U.S. at 520.

Since the crux of the inquiry into whether or not Congress has acted pursuant to a constitutional grant of authority in abrogating States' Eleventh Amendment immunity is the appropriateness of remedial measures considered in light of the evil presented *(City of Boerne*, 521 U.S. at 525), the inquiry necessarily is heavily focused upon the legislation, its legislative history, and the findings of Congress. These matters are specific to each piece of legislation so that the examination by a court into one piece of federal legislation cannot therefore predetermine the conclusion from examining a different piece of legislation.[4]

In *Garrett*, for example, this Court examined the record compiled by Congress in support of its conclusion to enact Title I of the ADA. Upon examining the record, the Court found the record virtually devoid of any evidence that the States had historically discriminated against the disabled in employment. The half a dozen examples cited by the respondents failed to suggest a pattern of unconstitutional discrimination. Since the remedy imposed by Congress under Title I of the ADA was not congruent or proportional to the targeted violations, this Court held

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[4] *See, e.g., Nevada Dep't of Human Resources v. Hibbs*, 123 S.Ct. 1972 (2003) (Congress did not exceed its constitutional authority under § 5 of the Fourteenth Amendment when it sought to abrogate States' immunity for violations of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 667 (1999) (Congress exceeded its authority under the Fourteenth Amendment when it enacted the Plant Variety Protection Remedy Clarification Act, 7 U.S.C. § 2321).

that Congress had not properly abrogated the States' Eleventh Amendment immunity from suits. *Garrett*, *supra*, 531 U.S. at 369.

Petitioners erroneously argue that the examination of Title I of the ADA by this Court in *Garrett* predetermines and controls the conclusions of an examination of Title II of the ADA.[5] Petitioners argue that *Garrett* controls the constitutionality of Title II of the ADA as applied to the States, despite the fact that this Court specifically refused to address the issue (*Garrett*, 531 U.S. at 360, n. 1), and despite the fact that the majority in *Garrett* noted that the overwhelming majority of accounts in Appendix C (attached to the opinion) "pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Id.* at 372, n. 7.

The issue in *Garrett* was whether Congress validly abrogated the States' Eleventh Amendment immunity when enacting a question not before the Court in this case. Pursuant to guidance from this Court, the holding in *Garrett* does not affect the question of whether Title II of the ADA was enacted pursuant to a constitutional exercise of power that validly abrogates the States' Eleventh Amendment immunity. *Id.* at 360, n. 1 ("We are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment . . .").

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[5] *But see* Note 4, *supra*.

Although this Court specifically warned that its opinion had no effect on deciding the constitutionality of Title II of the ADA, and thus whether a State is immune from damages for a claim brought under this federal legislation – and specifically, although Petitioners recognize that this Court has rejected Eleventh Amendment immunity claims in Title II and § 504 cases – Petitioners nevertheless argue that the holding in *Garrett* controls the outcome of the issues presented before this Court. Petitioners' Brief at 8.

What Petitioners have failed to address is the fact that Title II of the ADA differs dramatically from Title I. At the outset of the *Garrett* opinion, this Court specifically refrained from passing judgment on Title II as that title "has somewhat different remedial provisions from Title I." *Garrett*, 531 U.S. at 360, n. 1. This Court also contrasted the lack of documented history of discrimination in employment by the States with the Congressional record detailing discrimination by the States in providing public services. *Id.* at 372, n. 7. In the text of the statute itself, Congress made express findings of persistent discrimination in "education . . . institutionalization . . . voting, and access to public services" 42 U.S.C. § 12101(a)(3). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continues to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Congress reached this conclusion after holding 13 hearings devoted solely to the consideration of the ADA. A special task force was created that held hearings in every State, which were attended by more than 30,000 individuals, informing the congressional delegation of first hand accounts of discrimination.

Garrett, 531 U.S. at 377-378 (Breyer, J., dissenting). The findings amassed through the congressional hearings and individual State task force hearings led Congress to conclude that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically and educationally." 42 U.S.C. § 12101(a)(6). Thus, the Committee Reports that this Court found lacking for purposes of Title I were ample evidence of government discrimination with regard to **public services**. *See* S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28 (1990).

Garrett reaffirmed this Court's earlier treatment and analysis of federal legislation in relation to States' Eleventh Amendment immunity. Federal legislation enacted pursuant to § 5 of the Fourteenth Amendment may abrogate States' Eleventh Amendment immunity if it exhibits a "congruence and proportionality between the injury to be prevented and remedied and the means adopted to that end." *Id.* at 365, citing *City of Boerne*, 520 U.S. at 520.

The Ninth Circuit has faithfully applied this test to its decisions prior to the ruling in *Garrett* and to the opinions that have been handed down since this Court's February 2001 decision. In 1999, the Ninth Circuit undertook the exact analysis this Court later used in *Garrett*, unequivocally concluding that Title II of the ADA "was a congruent and proportional exercise of Congress' enforcement powers under § 5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity." *Dare v. State of California*, 191 F.3d 1167, 1175 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001).

Since this Court's holding in *Garrett*, the States of Oregon, Hawaii, and California have all relied on this Court's *Garrett* decision to argue in the Ninth Circuit Court of Appeals that the opinion foreclosed the applicability of Title II of the ADA as it applies to the States and that Congress had exceeded its congressional authority in enacting such legislation against the States. Explicitly pointing to the fact that this Court refused to rule on the ADA in its entirety, that Title II and III differ from Title I, the Ninth Circuit Court of Appeals has repeatedly concluded, after applying the two-part test outlined in *Seminole Tribe*, that Congress validly abrogated States' immunity with respect to Title II of the ADA and acted within its remedial powers under § 5 of the Fourteenth Amendment. *See, e.g.*, *Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003); *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 962 (2003); *Hason v. Medical Bd. of California*, 279 F.3d 1167, *reh'g en banc denied*, 294 F.3d 1166 (9th Cir. 2002), *cert. dismissed*, ___ U.S. ___, 2003 WL 1792116 (2003). Indeed, as the Ninth Circuit held in the case *infra*, it has already revisited its precedent following this Court's decision in *Garrett*, and, having faithfully applied the Court's two-part inquiry in each case, has "already rejected the State's claims." App-15.

Unlike the record of discrimination in State employment discussed in *Garrett*, there exists an extensive record of unconstitutional State conduct regarding people with disabilities in the areas covered by Title II. Operations of a State affect individuals' voting rights, the right to redress grievances, and the right to humane confinement, among others. These rights are subject to the constitutional limitations of the first ten amendments of the United States Constitution as incorporated and applied to the

States through the Fourteenth Amendment. The Ninth Circuit relied on the extensive record and documented pattern of unconstitutional discrimination in *Dare v. California* and continues to follow well established precedent that Title II meets the necessary congruence and proportionality tests (especially in light of constitutional constraints on State activities by the United States Constitution), and Congress validly abrogated States' Eleventh Amendment immunity under its enforcement powers of § 5 of the Fourteenth Amendment. *Miranda B., supra*, 328 F.3d 1181 (9th Cir. 2003) (parenthetical added).

Because the Ninth Circuit has consistently applied this Court's analysis in determining whether the States are entitled to sovereign immunity for claims brought under Title II of the ADA, review of the lower court decision is unnecessary, since it does not conflict with any decision of this Court.

IV. Likewise, review is not necessary because the Ninth Circuit applied this Court's clearly established principles in holding that the two state correctional institutes could be sued for violations of § 504 of the Rehabilitation Act of 1973.

Although Petitioners are correct in their assessment that the circuits are divided on the question whether Congress properly abrogated States' sovereign immunity for § 504 of the Rehabilitation Act under § 5 of the Fourteenth Amendment (Petitioners' Brief at 10), the majority of circuits, including the Ninth Circuit, are in agreement that Congress properly subjected the States to suits for private damages for violations of § 504 under its Spending Clause authority.

In *Clark v. State of California*, *supra*, 123 F.3d 1267 at 1270, the Ninth Circuit held that § 504 of the Rehabilitation Act of 1973 is a valid exercise of authority under Congress' Fourteenth Amendment legislative power. Since then, the Ninth Circuit has consistently held – and even as recently as this month – that States waive their sovereign immunity under the Eleventh Amendment to claims brought under § 504 of the Rehabilitation Act if they accept federal Rehabilitation Act funds. *See*, *e.g.*, *Pugliese v. Dillenberg*, No. 01-16544 (October 7, 2003).

Petitioners complain that "the Ninth Circuit viewed the waiver in the Rehabilitation Act simply as an exercise of Congress's [sic] spending power." Petitioners' Petition at 20. Petitioners have oversimplified the Ninth Circuit's holdings in this regard. Just as the Ninth Circuit did when examining Title II of the ADA, it examined § 504 under the two-part test outlined in this Court's decision *Seminole Tribe*. *Clark*, *supra*, 123 F.3d at 1269-1270.

The first part of the test is satisfied by 42 U.S.C. § 2000d-7(a)(1), which provides that "a state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of section 504 of the Rehabilitation Act of 1973." *Clark*, *supra*, 123 F.3d 1267 at 1269-1270.

Examining the second part of the *Seminole Tribe* test – whether Congress had acted under a valid exercise of power – the court in *Clark* looked to this Court's precedent set forth in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 244, n. 4 (1985) for guidance. *Id.*

In *Atascadero State Hospital*, *supra*, this Court assumed without deciding that the Rehabilitation Act was enacted under the Fourteenth Amendment, and in dicta

two years later, expressly noted that "[t]he Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment." *Welch v. Texas Dep't of Highways & Pub. Trans.*, 483 U.S. 468, 472, n. 2 (1987).

Relying on *Atascadero State Hospital v. Scanlon*, the Ninth Circuit affirmed its ruling in *Clark* and joined four other circuits in holding that a State waives its Eleventh Amendment immunity by accepting federal funds. *Douglas v. California Dep't of Youth Authority*, 271 F.3d 812, 819 (9th Cir. 2001), *rehearing en banc denied*, 285 F.3d 1226 (9th Cir. 2002), *cert. denied*, 2002 LEXIS 4495 (June 17, 2002).[6]

Guided by the Supreme Court's rulings in *Atascadero* and *Seminole Tribe*, the Ninth Circuit Court in *Clark* properly concluded that a State waives its sovereign immunity to suit under § 504 of the Rehabilitation Act, where, after the amendments to the language in the Rehabilitation Act provided for a clear waiver, the State

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[6] *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc) (by accepting federal Rehabilitation Act funds, States waive their immunity with regard to this section); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) ("the Rehabilitation Act is enforceable in federal court against recipients of the federal largess"); *Sandoval v. Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), *reversed on other grounds*, *Alexander v. Sandoval*, 531 U.S. 1049, 121 S.Ct. 1511 (2000) (describing the Rehabilitation Act's waiver as a "clear" waiver of State sovereign immunity in exchange for federal funds); *See also Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 292 (4th Cir. 2001) ("[A]ny State reading [the Rehabilitation Act's explicit waiver of sovereign immunity] would clearly understand that, by accepting Title IX funding, it was consenting to resolve disputes regarding alleged violations of the Act's anti-discrimination provisions in federal court").

knowingly accepts federal funds under that section. *Clark, supra*, 123 F.3d 1267 at 1271.

According to Petitioners' argument, *College Savings Bank, supra* left open the issue of whether a congressional condition of acceptance of federal funds on a State's waiver of sovereign immunity constitutes a condition on Congress' spending power or as the waiver of the constitutional right which must be knowing, voluntary and unequivocal. Petitioners' Brief at 20.

College Savings Bank, a case decided by this Court two years after the Ninth Circuit's *Clark,* held that the decision to waive immunity must be an "altogether voluntary" one, and, as with any other waiver of a constitutional right, there must be an "intentional relinquishment or abandonment of a known right or privilege." *College Savings Bank, supra*, 527 U.S. at 681-82.

Petitioners argue that "the majority of the circuits have focused solely on this Court's statements [in *College Savings Bank*] regarding the authority of Congress to place conditions on the receipt of federal funds under its spending power." Petitioners' Brief at 28.

In *College Savings Bank,* the Court reviewed the issue of constructive waiver that it had previously expounded on in *Parden v. Terminal Ry. of Alabama State Docks Dep't.,* 377 U.S. 194 (1964). *College Savings Bank, supra*, 144 L. Ed. 2d 605 at 617. In *Parden,* the Court held that even though the Federal Employers' Liability Act (FELA, 45 U.S.C. § 53) did not provide for an express waiver of sovereign immunity as a condition of participation in interstate commerce, a State had constructively waived its sovereign immunity defense by operating a railroad in interstate commerce. *Id.* at 677 (citing *Parden,* 377 U.S. at 192). While the Supreme

Court in *College Savings* overruled the constructive waiver doctrine and refused to recognize waivers implied from participation of a State in a federal program, it also distinguished the situation in *College Savings* from situations where Spending Clause legislation is used to exact a waiver of sovereign immunity. *Id.* at 686. In denying Congress the ability to exact a waiver in FELA, the Supreme Court avowed that Congress could not use its Article I powers to create a constructive waiver of sovereign immunity or sanction States by excluding them from an otherwise permissible activity. *Id.*

In contrast, the Supreme Court in *College Savings Bank* made more explicit what *Seminole Tribe* implies – "that Congress may, in the exercise of its Spending Power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions". *Id.* "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *Id.*

Therefore, if the States refuse to agree to the condition of sovereign immunity when faced with Spending Clause legislation, they simply lose the benefit of a gift. But in the case of FELA (at issue in *College Savings Bank*), a State that refused gave up its sovereign immunity was faced with a sanction – exclusion from the State in an otherwise permissible activity. *Id.*

Contrary to the argument proposed by the Petitioners, this Court's holding in *College Savings Bank* not only affirmed Congress' authority to place conditions on the receipt of federal funds, but it also affirmed that Congress has the ability to condition waiver of States' Eleventh

Amendment immunity in Spending Clause legislation where express language of the statute clearly informs the States of the implication of accepting federal funds. *Id.* at 676. Moreover, as the Court recognized in *South Dakota v. Dole,* while it is true that federal inducement offered to States can be coercive, States also voluntarily exercise their own choice in accepting the conditions attached to receipt of the federal funds. 483 U.S. 203, 211-12 (1987).

Spending Clause legislation offers gifts to the States that the federal government is under no duty to dispense with. The Spending Clause power allows the federal government to "provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds . . . 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance with federal statutory and administrative directives.'" *South Dakota, supra*, 483 U.S. 203 at 207 (citations omitted). Further, the Spending Clause power is considerable and Congress may carry out "objectives not thought to be within Article I's 'enumerated legislative fields' . . . through the use of spending power and the conditional grant of federal funds." *Id.* at 208 (quoting *United States v. Butler,* 297 U.S. 1, 66 (1936)).

It is undisputed that State sovereign immunity is not absolute. Congress may abrogate such immunity in federal court if it makes its intentions unmistakably clear in the language of the statute and acts pursuant to a valid exercise of power. *Green v. Mansour*, 474 U.S. 64 (1985).

Yet, Petitioners argue that this Court needs to clarify "an important question that divides the federal circuits" on this issue (Petitioners' Brief at 28). Respondent submits

that review is not necessary, because this Court has already articulated a two-part test to determine whether Congress has properly abrogated a State's Eleventh Amendment immunity. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Petitioners do not dispute that § 2000d-7(a) of Title 42 of § 504[7] clearly suffices to meet the first part of the two-part test outlined in *Seminole Tribe*, and that the consensus within the circuit courts of appeals is that this language is effective in putting States on clear notice that application for and acceptance of federal funds is conditioned upon the States' consent to suit in federal court for violations of § 504.[8]

Nonetheless, Petitioners rely on the minority decisions from the Second and Fifth Circuit Courts of Appeals in arguing that this Court should review whether the States could have been said to have "knowingly and voluntarily waived their constitutional right to sovereign immunity." Petitioners' Brief at 28.

In *Alden v. Maine*, 527 U.S. 706, 755 (1999), this Court stated that "the federal government [does not] lack the authority or means to seek the States' voluntary

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[7] "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of 504 of the Rehabilitation Act of 1973."

[8] Even the Second and Fifth Circuits, which have held that Congress did not properly abrogate State sovereign immunity under § 504 for a period of time, have not disputed that § 504 may generally be applied to the States in the future and that the express language of § 2000d-7(a) of Title 42 evidences a clear intent by Congress to abrogate the States' sovereign immunity.

consent to private suits. During the same term that *Alden* was decided, in the *College Savings* case, this Court reaffirmed its holding in *Petty v. Tennessee Missouri Bridge Commission*, 359 U.S. 275 (1959), determining that Congress could condition the exercise of its Article I powers on the States' agreement to waive their Eleventh Amendment immunity from suit. *College Savings Bank, supra*, 527 U.S. 666 at 686. This Court even went further and stated that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Id.; see also, Id.* at 678-79, n. 2. Unlike Congress' power under the Commerce Clause, the Court explained that Congress' exercise of power to spend money in the form of a grant is a gift on which Congress could place reasonable conditions that the States were free to accept or reject. *Id.* at 687.

While this Court requires a knowing and voluntary waiver of a State's sovereign immunity, this Court has never required an examination into the subjective intent of the State, as the Second and Fifth Circuits suggest. *See Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2nd Cir. 2001); *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, *rehearing en banc allowed*, 2003 WL 21692677 (5th Cir. 2003). And, contrary to the Petitioners' suggestion that this Court has left open the question of what is a knowing and voluntary waiver of States' sovereign immunity (Petitioners' Brief at 28), this Court has already held that States may waive their immunity either by explicitly specifying their intention to subject themselves to suit or by voluntarily participating in federal spending programs where Congress has expressed a clear intent to condition receipt of federal funds on States' consent to waive their

sovereign immunity. *Atascadero State Hospital, supra*, 473 U.S. 234 at 238, n. 1.

A waiver of Eleventh Amendment immunity as a condition of the receipt of federal funds should be found "only where stated by the most expressive language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Yet, nothing more than a "clear declaration" is needed, for a State to validly waive sovereign immunity upon the receipt of federal funds. *College Savings Bank*, 527 U.S. at 676. As long as the statute's language clearly expresses Congress' intention to exchange the State's waiver of sovereign immunity for the federal largess which § 504 of the Rehabilitation Act clearly does, it is up to the State entity to weigh the costs and benefits of accepting the federal funds. A State weighs the cost to be subject to suit in federal court for those entities, programs or activities receiving federal money under Spending Clause legislation, and "knowingly waives" their sovereign immunity upon receipt of the specified dollars under the statute.

Just last term, this Court noted that the Rehabilitation Act is Spending Clause legislation and expounded on the "contractual nature" of such legislation in *Barnes v. Gorman*, 122 S.Ct. 2097, 2002 U.S. LEXIS 4421, 70 U.S.L.W. 4548 (2002).

In the *Barnes* case, this Court was asked to decide whether punitive damages may be awarded in private suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act of 1973. *Id.* In answering the question, the Court was required to analyze Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*) as its provisions detail the

remedies for violations of the provisions of the ADA and Rehabilitation Act at issue. *Id.* at 16. Noting that Title VI, like § 504 of the Rehabilitation Act, are Spending Clause legislation (*Id.*, n. 3), the Court averred that the "contractual nature" of Spending Clause legislation "has implications for our construction of the scope of available remedies." *Id.* at 14, n. 2 (citations omitted). The Court went on:

> "We have repeatedly characterized this statute and other Spending Clause legislation as "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions". *Pennhurst State Sch. and Hospital v. Halderman,* 451 U.S. 1, 17 (1981) (emphasis added); *see also Davis v. Monroe County Bd. of Ed.,* 526 U.S. 629, 640; *Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 286 (1998); *Guardians Assn. v. Civil Serv. Comm'n of New York City,* 463 U.S. 582, 599 (1983) (opinion of White, J.); *id.* at 632-633 (Marshall, J., dissenting); *Lau v. Nichols,* 414 U.S. 563, 568-69 (1974). Just as a valid contract requires offer and acceptance of its terms, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract' . . . Accordingly, if Congress intends to impose a condition on the grand of federal money, it must do so unambiguously." *Id.* at 9-10.

The analysis of offer and acceptance in contractual matters is purely objective. A State manifests its assent to waive its sovereign immunity under § 504 of the Rehabilitation Act when it applies for and accepts federal funds.

This Court recently strengthened this reasoning in *Lapides v. Board of Regents of the University System of Georgia*, 122 S.Ct. 1640 (2002), when it held that a State's waiver of immunity turns upon its objective conduct (in that instance, removing a case to federal court), even though the State did not believe at the time it engaged in that conduct that it would result in a waiver of immunity. *Id.* at 1645-1646. In so holding, this Court specifically declined to adopt an examination of the waiver issue that would turn upon the State's subjective beliefs, casting substantial doubt to the continued validity of the reasoning adopted by the Second and Fifth Circuits in *Garcia* and *Pace*.

This Court explained, "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Lapides*, *supra*, at 122 S.Ct. at 1645-1646. In *Lapides*, removal was a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to the litigation of a State law in federal court; while in the case *infra*, application and receipt of federal funds under § 504 of the Rehabilitation Act was a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's Eleventh Amendment immunity. As Justice Kennedy pointed out in the *Lapides* case, "once the States know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal. *Id.*

It must logically follow, then, that when a State applies for and receives federal funds conditioned upon the waiver of the State's Eleventh Amendment immunity, the State is clearly aware that its voluntary act will subject it

to the jurisdiction of the federal courts and the notice and action by the State suffices to make it a valid waiver of immunity under this Court's precedence.

Relying on important Supreme Court precedent, the Ninth Circuit concluded in the case *infra* that the Petitioners waived their Eleventh Amendment immunity under § 504 of the Rehabilitation Act by accepting federal funds. *See* App-16.

Atascadero and *College Savings Bank* reaffirm the power of the federal government to condition the receipt of federal funds on a State's waiver of sovereign immunity. As long as the statute's language clearly expresses Congress' intention to exchange the State's waiver of sovereign immunity for the federal largess, it is up to the State entity to weigh the costs and benefits of accepting the federal funds. A State weighs the cost to be subject to suit in federal court for those entities, programs or activities receiving federal money under Spending Clause legislation, and "knowingly waives" their sovereign immunity upon receipt of the specified dollars under the statute.

The Ninth Circuit's opinion in this case, in *Clark* and others, that § 504 is a constitutional exercise of Congress under the Spending Clause is in agreement with the majority of the federal appellate courts that have addressed the issue, and with this Court's rulings.

The holding in the court below is correct and does not conflict with any decision of this Court or raise any significant conflict with a decision of any other courts of appeal. This Court has repeatedly denied petitions for writ of certiorari in recent years which advanced some of the same arguments pressed here by Petitioners regarding the

same statute. *See, e.g., Hawaii v. Vinson*, 123 S.Ct. 962 (2003) (No. 01-1878); *Ohio E.P.A. v. Nihiser*, 269 F.3d 626 (6th Cir. 2001), *cert. denied sub nom Ohio E.P.A. v. Nihiser*, 536 U.S. 922 (2002); *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 962 (2003). Accordingly, further review is not warranted.

CONCLUSION

For the reasons discussed above, the Respondent respectfully requests that the petition for a writ of certiorari be denied in its entirety.

Respectfully submitted,

DAWNA F. SCOTT
LAW OFFICE OF DAWNA F. SCOTT, P.C.
Lakeside Plaza, Suite 300
8 North State Street
Lake Oswego, Oregon 97034
(503) 636-0400

Counsel for Respondent,
Billy Ray Phiffer

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, *et al.*,
Petitioners,

v.

BILLY RAY PHIFFER, an individual,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS *
Solicitor General
JANET A. METCALF
Assistant Attorney General
400 Justice Building
Salem, Oregon 97301-4096
(503) 378-4402

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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I. Unlike *Tennessee v. Lane* (02-1667), this case does not involve alleged due process violations; granting certiorari in this case, thus, may complement the grant in the Tennessee case.

In their petition seeking the issuance of a writ of certiorari, the state petitioners noted that, although this Court has granted the State's petition in *Tennessee v. Lane,* on a question essentially identical to the first question posed in the State's petition here, a grant of certiorari in this case nonetheless may complement the Tennessee case: (1) because, despite having granted certiorari three times to resolve that question, the opportunity for this Court to address the question has thus far proved elusive, and (2) because the claims at issue in the Tennessee case are based on alleged due process violations. In contrast, the claims at issue here are based solely on supposed equal protection violations.

In response, respondent Phiffer completely misses the State's point. He appears to believe that the State is asserting that due process claims are at issue here, and he thus observes, accurately but inappositely, that due process issues have "never been raised by the Petitioners herein, nor ha[ve] [they] ever been litigated in this case." (Response 4). As a procedural matter, he is correct, but that indeed is the State's point. Because this case does not involve alleged due process violations and was not decided below based on any supposed contrast between the analysis that applies to due process, as compared to equal protection, violations, it provides a potential contrast and complement to the Tennessee case. Given that this Court three times has granted certiorari to resolve the important issue of whether Congress validly abrogated the States' sovereign immunity with respect to claims brought under Title II of the Americans with Disabilities Act, and yet has had cases disappear and the opportunity to resolve the issue disappear along with them, it may well be prudent to grant certiorari in this case as well as in the Tennessee one.

II. Although the Ninth Circuit has sometimes parroted portions of this Court's Eleventh Amendment jurisprudence, it has not faithfully applied that case law, as respondent Phiffer contends it has.

Respondent Phiffer contends that, in this case, "[t]he Ninth Circuit Court of Appeals followed the line of cases decided by this Court in interpreting whether the Eleventh Amendment was a bar to the Respondent's claim under Title II of the ADA, the application of which is uniform, general and clearly established." (Response 4-5). If it were all so easy, "uniform, general and clearly established," of course, it would be difficult to understand why the circuit courts of appeal are deeply divided, and split four ways, on this issue, why this Court has granted certiorari three times to resolve it, and why, as Tennessee noted in its petition in *Lane,* the "Ninth Circuit stands in complete opposition to the other circuits," being the only one post-*Garrett* to have "specifically declined to reexamine Title II under the analysis required by this Court in *Garrett*[.]" (*Tennessee*, Pet. for Cert. 13). *See Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).

In urging this Court not to grant certiorari in this case, respondent mischaracterizes petitioners' argument. According to respondent, "[p]etitioners erroneously argue that the examination of Title I of the ADA by this Court in *Garrett* predetermines and controls the conclusions of an examination of Title II of the ADA." (Response 8; footnote omitted). However, that is not now, and never has been, petitioners' argument. Instead, petitioners have argued consistently, not that the outcome in *Garrett* controls, but that the Ninth Circuit steadfastly has refused to apply the analytical method prescribed in that decision, as well as in other decisions from this Court.

In their appellants' brief filed with the Ninth Circuit Court of Appeals, for example, petitioners noted that court's post-*Garrett* decision in *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167

(9th Cir. 2002), *reh'g en banc denied* 294 F.3d 1166, *cert. dismissed* ___ U.S. ___, 2003 WL 1792116 (2003), was distinguishable because it merely rejected the state's argument that "*Garrett* overrule[d] both *Clark* [*v. State of California,* 123 F.3d 1267 (9th Cir. 1997), *cert. denied sub nom Wilson v. Armstrong*, 524 U.S. 937 (1998)] and *Dare* [*v. California,* 191 F.3d 1167 (9th Cir. 1999), *cert. denied* 531 U.S. 1190 (2001)]." 279 F.3d at 1171. In this case, however, petitioners do not argue simply that *Garrett* "overrules" *Clark* and *Dare*. "Instead, [the state] defendants contend that both the result reached and the analytical method employed in *Garrett* requires a reexamination of the Eleventh Amendment issues considered in those cases, and that such a reexamination necessarily must lead to a different result."
(App. Br. 10-11; footnote omitted).

Although respondent insists that the Ninth Circuit has "faithfully applied" this Court's Eleventh Amendment jurisprudence (Response 10, 11), an examination of that court's decisions with respect to both Title II of the ADA and Section 504 of the Rehabilitation Act hardly supports that endorsement. Before *Garrett,* the court gave great deference to Congress's judgment when purporting to abrogate State sovereign immunity, asserting that "Congress's power to pass legislation under the Fourteenth Amendment is very broad," and that "Congress acts within its authority under the Fourteenth Amendment if the court can perceive a basis upon which Congress might predicate a judgment that the state action constituted an invidious discrimination in violation of the Equal Protection Clause." *Clark*, 123 F.3d at 1270 (internal quotation marks and citation omitted). In contrast to that highly deferential approach, in *Garrett* this Court emphasized that, if Congress is to validly abrogate the States' sovereign immunity when acting under its Fourteenth Amendment, section 5 authority, Congress must identify a pattern of unconstitutional discrimination on the part of the States. *Garrett*, 531 U.S. at 369-74.

Post-*Garrett*, the Ninth Circuit was no more thoughtful in applying or true to this Court's analytical method than it had been before. In *Hason*, the court merely observed that, before *Garrett*, it had "held that in enacting Title II of the ADA Congress validly abrogated state sovereign immunity," and then the court summarily swept aside the state's argument that "*Garrett* overule[d] both *Clark* and *Dare*." 279 F.3d at 1170, 1171. The court's analysis consists of two sentences, one observing that, in *Garrett*, this Court "expressly declined to decide whether Congress validly abrogated State sovereign immunity in enacting *Title II* of the ADA," and the other "therefore conclud[ing] that [because] *Garrett* does not overrule either *Clark* or *Dare*," the plaintiff's Title II claims were not barred by the Eleventh Amendment. 279 F.3d at 1171 (emphasis in original).

The Ninth Circuit's subsequent treatment of the issue is no more probing than it was in *Hason*. In *Lovell v. Chandler*, 303 F.3d 1039, 1050-51 (9th Cir. 2002), the court simply observed that *Garrett* had not decided the Title II issue, that the court "recently held in *Hason* * * *, that *Clark* and *Dare* are still good law as to Title *II* of the ADA, and that the Eleventh Amendment does not bar claims against the State brought under Title *II* of the ADA." (Emphasis in original). "Thus," the court summarily concluded, "we reject the State's argument as to Title II of the ADA." (Footnote omitted). *See also Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1185 (9th Cir. 2003) (adhering to *Clark* and *Dare* because *Garrett* did not overrule them, and concluding that court is "bound by [its] holding in *Hason*").

Clinging steadfastly, and uncritically, to the Ninth Circuit's pre-*Garrett* case law regarding Title II hardly amounts to "faithfully appl[ying]" this Court's analytical methodology. Nor does Ninth Circuit precedent regarding Section 504 of the Rehabilitation Act fare any better when it is examined in light of the methodology outlined by this Court in *Garrett* and in other decisions.

In *Clark*, the court reasoned that, because Section 504 was enacted pursuant to section 5 of the Fourteenth Amendment, it therefore validly abrogated the States' sovereign immunity. The court observed: that this Court's "opinions have consistently considered section 504 to be enacted pursuant to the Fourteenth Amendment;" that, in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 244 n. 4, this Court "assumed without deciding that the Rehabilitation Act was enacted under the Fourteenth Amendment;" and that later, in dicta, this Court "expressly noted that '[t]he Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment." 123 F.3d at 1271, citing *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 n. 2 (1987). Finally, the court cited its own decision "expressly [holding] that the Rehabilitation Act was enacted under the Fourteenth Amendment." *Id.*, citing *Scanlon v. Atascadero State Hosp.*, 735 F.2d 359, 361 (9th Cir. 1984), *rev'd on other grounds*, 473 U.S. 234 (1985).[1].

Of course, the fact that the Rehabilitation Act was enacted pursuant to section 5 of the Fourteenth Amendment does not answer the question of whether Congress validly abrogated the States' sovereign immunity in the Act. Nowhere in *Clark* is there any discussion of the legislative history underlying Section 504 or of whether the Act's remedial scheme is congruent with and proportional to the targeted violation. *Garrett*, 531 U.S. at 374 ("remedy imposed by Congress must be congruent and proportional to the targeted violation"). Thus, *Clark* cannot be said even to make an attempt at applying the analytical methodology that this Court has held should apply when judging the validity of an act of Congress purportedly abrogating State sovereign immunity.

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[1] The court's decision in *Clark* with respect to Section 504 was also based on a waiver analysis—a subject discussed in the next section of this reply brief. Subsequently, the court has skirted the Eleventh Amendment issue in cases involving Section 504 claims by relying on a waiver analysis. *See. e.g., Miranda B.*, 328 F.3d at 1186; *Lovell*, 303 F.3d at 1051.

The Ninth Circuit's refusal to examine critically or in any detail the legislative history underlying Title II of the ADA and Section 504 is echoed in respondent's brief. Although respondent insists that "[u]nlike the record of discrimination in State employment discussed in *Garrett*, there exists an extensive record of unconstitutional State conduct regarding people with disabilities covered by Title II," respondent provides no evidence to support that assertion. (Response 11). Instead, respondent relies on what he contends is "the extensive record and documented pattern of unconstitutional discrimination [cited] in *Dare* [.]" (Response 12).

In *Dare*, however, the court relied exclusively on the factual findings of discrimination that Congress made in the ADA itself. 191 F.3d at 1174-75 (citing 42 U.S.C. § 12101(a)). Respondent also relies on those findings. (Response 9-10). But, as this Court held in *Garrett*, such Congressional findings, without more, cannot provide the re-quired evidence of "a pattern of discrimination by the States which violates the Fourteenth Amendment [.]" 531 U.S. at 374. A bare finding that discrimination against the disabled exists in "public services," 42 U.S.C. § 12101(a)(3), provides little information, and it certainly does not establish that *the states* have engaged in *unconstitutional* discrimination in that regard.

In arguing that Title II is significantly different than Title I of the ADA, respondent also appears to rely simply on the size of the record Congress "amassed through the congressional hearings and individual State task force hearings[.]" (Response 10). The mass of the Congressional record cannot substitute for pertinent evidence of unconstitutional discrimination on the part of the states.

More extensive and thoughtful reviews of the congressional record underlying Title II (and the Rehabilitation Act) have found much the same dearth of evidence that this Court identified in *Garrett* with respect to Title I. *See Reichenbacker v. Foster*, 274 F.3d 974, 981-82 (5th Cir. 2001) (finding same flaws in congressional record regarding Title II that

the Court found in *Garrett* regarding Title I); *Thompson v. Colorado*, 278 F.3d 1020, 1033-34 (10th Cir. 2001) (en banc), *cert. denied* 535 US 1077 (2002) (summarizing congressional record regarding Title II and reaching same conclusion); *Panzardi-Santaigo v. University of Puerto Rico*, 200 F. Supp. 2d 1, 13 (D. Puerto Rico) (summarizing the results of the court's "thorough" review of the legislative history of the ADA and concluding that "[t]he legislative history of the statute, particularly as to Title II, suffers from the same deficiencies identified by the Court in *Kimel* [*v. Florida Bd. of Regents*, 528 U.S. 62 (2000),] and *Garrett*"). *See also* Roger C. Hartley, "Enforcing Federal Civil Rights Against Public Entities After *Garrett*," 28 J.C. & U.L. 41, 89 n. 272 (2001). ("There is no reason to believe that the Rehabilitation Act's legislative history better supports a pattern of state employment discrimination than does that of the ADA Title I.").

Finally, respondent criticizes petitioners for "fail[ing] to address * * * the fact that Title II of the ADA differs dramatically from Title I." (Response 9). Respondent notes that, in *Garrett*, "this Court specifically refrained from passing judgment on Title II as that title 'has somewhat differing remedial provisions from Title I.'" (Response 9, quoting *Garrett*, 531 U.S. at 360 n. 1). The remedial provisions of Title II have essentially the same flaws as those of Title I, however. Title II requires that a state make "reasonable modifications" in its programs, services, and activities, 42 U.S.C. § 12134, 28 C.F.R. §§ 35.130(b)(3)-(8), for "quailfied individual[s] with a disability," *id.*, 42 U.S.C. § 12131(2), unless the state can establish that the modification would work a fundamental alteration in the nature of the program, service, or activity, 28 C.F.R. § 35.130(b)(7). As the Second Circuit observed in *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 109 (2nd Cir. 2001),

> [w]hile the absence of a reasonable accommodation would be permissible under the Fourteenth Amendment

> so long as there were *any* rational basis for the absence, this provision of Title II allows but a single basis for not providing the accommodation: a showing that a fundamental alteration in the nature of the program, service, or activity would occur.

(Emphasis in original). *See also Thompson*, 278 F.3d at 1031 (in contrast to the Equal Protection Clause, Title II requires public entities "to make favorable accommodations on" behalf of the disabled).

Thus, despite respondent's argument to the contrary, the "reasonable accommodation" requirement is neither congruent with nor proportional to the Fourteenth Amendment right. *See also Reichenbacker*, 274 F.3d at 983 ("Since the accommodation obligation imposed by Title II and § 504 of the Rehabilitation Act far exceeds that imposed by the Constitution, we cannot conclude that they are proportional and congruent to the legislative findings of unconstitutional discrimination against the disabled by the States") (footnote omitted). In addition, "whereas under the Fourteenth Amendment the absence of an accommodation would be presumptively permissible with the burden of challenging it squarely on the plaintiff, Title II shifts the burden of proof onto the state to defend the absence." *Garcia*, 280 F.3d at 109-10.

In sum, with respect to petitioners' arguments regarding Title II of the ADA and Section 504, respondent mischaracterizes or misunderstands petitioners' reliance on *Garrett*, which petitioners cite, not for its precise holding, but for its reasoning—reasoning that is incompatible with that repeatedly employed by the Ninth Circuit. Moreover, respondent relies on legislative history that is not meaningfully distinguishable from that found wanting in *Garrett* and on a remedial scheme that is marred by the same flaws identified by this Court in that case. The result in *Garrett* does not control the outcome here, but the Court's reasoning applies with equal force to Title II of the ADA and Section 504 of the Rehabilitation Act.

III. The State petitioners did not knowingly waive their immunity to claims brought under Section 504 of the Rehabilitation Act; respondent, like the federal courts of appeal on one side of this circuit split, appears to conflate Congress's intent with the State's.

In their petition, the state petitioners established that the circuits are split in their approach to the issue of whether a state or a state agency waives its sovereign immunity to claims brought under Section 504 when it accepts federal funds. No one disputes that the Rehabilitation Act "manifests [Congress's] clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." *Clark*, 123 F.3d at 1271. That intent is unambiguously expressed in 42 U.S.C. § 2000d-7(a) (Response 18 n. 7).

What appears to divide the circuits instead is whether they come at the issue of waiver from the Spending Clause or the Eleventh Amendment side of the issue. Circuits approaching the issue from a Spending Clause perspective emphasize the great leeway Congress has to place conditions on the funding it gives to the States. (*See* Pet. for Cert. 20-24, canvassing cases). In contrast, the Second and Fifth Circuits have addressed the issue by focusing on Eleventh Amendment jurisprudence and asking whether a state's waiver is a knowing and voluntary one. *Garcia*, 280 F.3d at 114-15; *Pace v. Bogalusa City School Board.*, 325 F.3d 609, 615-16, *reh'g en banc allowed*, 339 F.3d 348 (2003). That tension point between Spending Clause and Eleventh Amendment jurisprudence—a tension point that pulls courts in opposite directions, *see Douglas v. California Dept. of Youth Authority*, 285 F.3d 1226 (9th Cir. 2002) (O'Scannlain, J., dissenting)—appears to be the source of the circuit split that the State asks the Court to examine and resolve in this case.

Respondent seems to take the same view as those circuit courts of appeal that have viewed the issue from a Spending Clause perspective only. Indeed, respondent appears to go even further by suggesting that the issue of waiver is "purely

objective" and that whether a State in fact has made a knowing and voluntary waiver is irrelevant. (Response 21). For that rather extreme view, respondent relies on this Court's decisions in *Barnes v. Gorman*, 536 U.S. 181, 153 L. Ed. 2d 230 (2002), and *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 152 L. Ed. 2d 806 (2002). (Response 20-22). Respondent misreads those decisions, however. In *Barnes*, this Court invoked the analogy between Spending Clause legislation and a contract, but this Court also held that, "[j]ust as a valid contract requires offer and acceptance of its terms, '[t]he legitimacy of Congress' power to legislate under the spending power * * * rests on whether the [recipient] *voluntarily and knowingly accepts* the terms of the "contract." 153 L. Ed. 2d at 236-27, quoting *Pennhurst State and School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added). Similarly, in *Lapides* this Court repeatedly emphasized that a State's waiver of sovereign immunity must be voluntary. 152 L. Ed. 2d at 812-13, 815. What *Lapides* made clear was that, if the waiver was knowing and voluntary, the State's "motive" was irrelevant. *Id.* at 814.

Thus, nothing in *Barnes* or in *Lapides* forecloses the issue that the State contends that this Court "left open in *College Savings Bank* [*v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999)]," and that the State asks this Court to address here: "when Congress conditions the acceptance of federal funds on the State's waiver of sovereign immunity, is that action reviewed as a condition under Congress's spending power or as the waiver of a constitutional right which must be knowing, voluntary and unequivocal?" (Pet. Cert. 20). That important question, which has split the circuits, is directly before the Court in this case.

CONCLUSION

For the reasons discussed in the petition for a writ of certiorari, as well as those discussed above, petitioners respectfully request that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS *
Solicitor General
JANET A. METCALF
Assistant Attorney General
400 Justice Building
Salem, Oregon 97301-4096
(503) 378-4402

* Counsel of Record

Counsel for Petitioners

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